

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JVON BYNUM,

Petitioner,

v.

WILLIE O. SMITH,

Respondent.

CASE NO. 4:07-CV-12767
JUDGE PAUL V. GADOLA
MAGISTRATE JUDGE PAUL J. KOMIVES

MEMORANDUM ORDER DENYING AS PREMATURE AND WITHOUT PREJUDICE
PETITIONER'S MOTION FOR EQUITABLE TOLLING (docket #3)

This matter is before the Court on petitioner's motion for equitable tolling to allow his petition to proceed. Petitioner asserts that he is entitled to equitable tolling of the limitations period based on his failure to receive notice of the Michigan Supreme Court's order denying his application for leave to appeal. Because petitioner's motion is premature, it will be denied without prejudice to petitioner reasserting his equitable tolling arguments should they later become relevant in this case.

Petitioner's arguments for equitable tolling seek to avoid the effect of the statute of limitations governing habeas applications, 28 U.S.C. § 2244(d). However, at this point the statute of limitations is not an issue in this case. Respondent has filed an answer which addresses only the merits of petitioner's claims, and does not raise a statute of limitations defense. Although the Court may raise the limitations issue on its own motion, it is not obligated to do so. *See Day v. McDonough*, 547 U.S. 198, 209 (2006). And, if it does so, the Court must provide notice to

petitioner and an opportunity to respond, and must assure itself that petitioner will not be prejudiced by the delay in considering the limitations issue. *See id.* at 210-11. Until such time as the limitations issue is raised by the parties or by the Court through proper notice to the parties, petitioner's request for equitable tolling is premature. *See Lopez v. Campbell*, 1:05-cv-00481, 2007 WL 2580482, at *3 (E.D. Cal. Aug. 31, 2007); *Dent v. Cain*, No. 05-2595, 2006 WL 2038161, at *4 (E.D. La. July 19, 2006); *cf. Goodwin v. Dretke*, 118 Fed. Appx. 817, 819-20 (5th Cir. 2004).

Accordingly, it is ORDERED that petitioner's motion for equitable tolling is hereby DENIED AS PREMATURE. This denial is WITHOUT PREJUDICE to petitioner asserting his equitable tolling arguments should the limitations issue later be raised by respondent or the Court. The attention of the parties is drawn to FED. R. CIV. P. 72(a), which provides a period of ten days from the date of this Order within which to file any objections for consideration by the District Judge as may be permissible under 28 U.S.C. § 636(b)(1).

IT IS SO ORDERED.

s/Paul J. Komives
PAUL J. KOMIVES
UNITED STATES MAGISTRATE JUDGE

Dated: 1/15/08

The undersigned certifies that a copy of the foregoing order was served on the attorneys of record by electronic means or U.S. Mail on January 15, 2008.

s/Eddrey Butts
Case Manager